In the Supreme Court of the United States

October Term, 1968

No. [illegible]

[illegible] Petitioner,

v.

[illegible] Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 530

ESTATE OF RUSSELL HARRISON VARIAN, DECEASED, DOROTHY HILL VARIAN, EXECUTRIX, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

This is an estate tax case in which the Tax Court, in a reviewed decision, held against the decedent's estate on two principal issues: First, it ruled that one-half the property in three irrevocable trusts established by him and his wife for minor children was includible in his estate under Section 2038 of the 1954 Code and *Lober* v. *United States,* 346 U.S. 335, inasmuch as the decedent retained the power to control the timing of trust distributions, even though he could not alter the identity of the recipients except, possibly, as between the children and their estates (Pet. App. B, pp. 10–16, 26–33). Second, the court disallowed to the extent of $100,000 a charitable deduction with respect to a por-

tion of decedent's residual bequest to charity which could be invaded, up to a maximum of $100,000, for the children's extraordinary medical needs and to provide them with an advanced education; the court found as a fact that the likelihood of invasion of the corpus could not be characterized as "so remote as to be negligible." The trial judge and two others dissented with respect to the latter issue. (Pet. App. B, pp. 22–26, 34–37.)

The court of appeals affirmed, *per curiam*, on both issues. (Pet. App. C, p. 3.) [1] It also rejected the contention that petitioner had been deprived of due process because the Tax Court's findings of fact were not concurred in by the judge who heard the evidence.

The decision below is correct and does not conflict with the decisions of this Court or of the other courts of appeals. There is no basis for further review.

1. Petitioner (see Pet. 10–16) was not denied due process because the Tax Court judge who heard the evidence dissented from the majority opinion. The trial judge wrote a report, which was considered by the full Tax Court, and that judge then expressed his views in a dissenting opinion, which was before the court of appeals on the petition for review. The Tax Court, as the institutional fact-finder, considered and appraised the evidence set forth in the trial judge's

[1] Although petitioner does not specifically assign as error the adverse decision of the appellate court with respect to the charitable remainder issue (Pet. 9–10), we assume that because the question is factual it is implicit in petitioner's general constitutional argument that it was improper for the Tax Court majority to reject the factual conclusions of the trial judge. Cf. *Helvering* v. *Taylor*, 293 U.S. 507, 511.

report. Due process was thus satisfied—as has been held in every court of appeals' decision on the point. See *Heim* v. *Commissioner*, 251 F. 2d 44 (C.A. 8); *Towers* v. *Commissioner*, 247 F. 2d 233 (C.A. 2), certiorari denied, 355 U.S. 914; *Amoroso* v. *Commissioner*, 193 F. 2d 583 (C.A. 1), certiorari denied, 343 U.S. 926; *Halle* v. *Commissioner*, 175 F. 2d 500 (C.A. 2), certiorari denied, 338 U.S. 949; *Seaside Improvement Co.* v. *Commissioner*, 105 F. 2d 990 (C.A. 2), certiorari denied, 308 U.S. 618; cf. *Morgan* v. *United States*, 298 U.S. 468, 481–482.[2]

2. Nor did the courts below incorrectly apply (see Pet. 16–20) the doctrine of *Lober* v. *United States*, *supra*. In *Lober*, the decedent had created three trusts for his minor children, with himself as trustee, retaining the power to accumulate or distribute trust income until each child reached 21, with both accumulated and current income to be paid over to the child upon his attaining 21, and the corpus to go over to the child upon his reaching 25. The decedent had retained the power to pay over all or part of the corpus to the child at any time prior to the time set for ultimate distribution.

This Court viewed the trusts as conferring vested interests in the children under local law, but held that they were includible in the estate under the predecessor of Section 2038 because the decedent's power

[2] There is no conflict with the decision in *Universal Camera Corp.* v. *Labor Bd.*, 340 U.S. 474. The court of appeals did not here hold that the Tax Court majority's findings "bound" it, see 340 U.S. at 492. Instead, upon reviewing the record, it was "unable to perceive clear error." (Pet. App. C, p. 3.)

to distribute or accumulate current income and to distribute or withhold corpus constituted power to control full "enjoyment" of the trust property. 346 U.S. at 337. See Lowndes and Kramer, *Federal Estate and Gift Taxes* (2d ed. 1962) 186–187. In this case, even though the children or their estates will eventually receive the trust property, decedent, as trustee, could accelerate or postpone this receipt as he saw fit, just as was the case in *Lober*.

The fact that the trusts here were set up to comply with the "present interest" requirements of Section 2503(c) of the 1954 Code, for gift tax purposes, does not mean (see Pet. 16–18) that they should be excluded from the gross estate. Section 2503(c) was enacted simply to allow certain transfers to qualify for the $3,000 per donee annual exclusion by conferring "present interest" status on the minor child's interest, thus enabling the donor to use the exclusion and freeing him from the burden of filing a gift tax return in cases where the value of the gift was less than $3,000.[1] But the fact that there was a present gift is not inconsistent with including the transferred property in the donor's estate for purposes of the federal estate tax. Such an inclusion frequently occurs when the donor retains a power over or an inter-

[1] In two rulings apposite here, the Internal Revenue Service has taken the position that a transfer falling within Section 2503(c) for gift tax purposes may nevertheless be taxable for estate tax purposes if the donor dies while possessing the power to pay income and principal to the donee or to withhold enjoyment of the property until the donee attains a certain age. Rev. Rul. 57–366, 1957–2 Cum. Bull. 618; Rev. Rul. 59–357, 1959–2 Cum. Bull. 212, 214.

est in the property of the nature described in Sections 2035 through 2038 of the Code. See *Smith* v. *Shaughnessy*, 318 U.S. 176, 179; see, also, Section 2012 of the 1954 Code (relating to credit for gift tax).

3. The decision in *Estate of Chrysler* v. *Commissioner*, 361 F. 2d 508 (C.A. 2), is not in conflict. Although the underlying factual situation is close, the terms upon which the court put its decision make it plain that the court there did not decide the questions involved here. In *Chrysler*, securities were registered in the name of the decedent as custodian for his children under the New York Gift of Securities to Minors Act. The securities were not originally owned by the decedent, and they were purchased with funds which the court held belonged to the children before the securities were purchased. That the court in the *Chrysler* case did not decide the issue which is raised here is made clear by the following quotation from the *Chrysler* opinion:[4]

> "In short, decedent had relinquished to his children all beneficial interest in the three sources of funds with which securities registered under the custodianship statute were purchased. Decedent reserved neither a life estate nor the power to terminate or alter enjoyment. He could not increase his powers over property previously transferred without the consent of the children. * * * For this reason we need not decide whether the 1956 New York custodianship statute gives such broad powers to a custodian as to require the inclusion of the custodial property in his gross estate under §§ 2036 and

[4] 361 F. 2d at 511.

2038; since even if the statute gives such powers, decedent lacked the authority to assert them over property or the fruits of property previously held by his children free of comparable restrictions."

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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